IN THE SUPREME COURT OF OHIO

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION

TRUMBULL COUNTY, OH; LAKE COUNTY, OH; PLAINTIFFS' EXECUTIVE COMMITTEE,

Plaintiffs-Respondents,

v.

PURDUE PHARMA L.P., et al.,

WALGREENS BOOTS ALLIANCE, INC., WALGREEN CO., WALGREEN EASTERN CO., INC; CVS PHARMACY, INC., OHIO CVS STORES, LLC, CVS TENNESSEE DISTRIBUTION, LLC, CVS RX SERVICES, INC., CVS INDIANA, LLC; WALMART INC,

Defendants-Petitioners.

Case No. 2023-1155

On Review of Certified Question from the U.S. Court of Appeals for the Sixth Circuit, Case No. 22-3750 et al.

PRELIMINARY MEMORANDUM FOR PETITIONERS

Donald B. Verrilli, Jr.*
Ginger D. Anders*
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Avenue NW
Washington, DC 20001
(202) 220-1100

Counsel for CVS Petitioners

Noel J. Francisco*
John M. Majoras*
Anthony J. Dick*
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939

James Saywell (#0092174)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-1190

Counsel for Walmart Inc. Petitioner

Jeffrey B. Wall (*pro hac vice motion pending*)
Morgan L. Ratner*
Zoe A. Jacoby*
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Washington, DC 20006
(202) 956-7500

Counsel for Walgreens Petitioners

* *Pro hac vice motion forthcoming.*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Legislative Materials

INTRODUCTION

The question certified by the U.S. Court of Appeals for the Sixth Circuit arises out of a federal multidistrict litigation involving the abuse and diversion of prescription opioid medications. In this lawsuit, plaintiffs Lake and Trumbull Counties are not suing the pharmaceutical companies that manufactured and marketed opioids or the doctors who prescribed them. Rather, the Counties are suing *pharmacies* for dispensing legal medications prescribed by doctors licensed by the federal government to write such prescriptions. The Counties rely on the common law of public nuisance, a tort theory that has historically been used to address physical intrusions into a community's shared resources, like noxious fumes in the air or a chemical spill into a river. The Counties claim that the pharmacies contributed to a public nuisance when their pharmacists filled opioid prescriptions written by licensed doctors.

The Counties' claims are squarely foreclosed by Ohio law. In the Ohio Product Liability Act (OPLA), the Ohio General Assembly barred liability for "*any* [common-law] public nuisance claim" based on, among other things, the "marketing," "distribution," "or sale of a product." R.C. 2307.71(A)(13) (emphasis added). The Counties' complaints literally track that language. They allege that pharmacies "created and maintained a [common-law] public nuisance" by "marketing," "distributing," and "selling" a product: prescription opioids. Supp. Am. Compls. ¶ 619, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804 (N.D. Ohio June 5, 2020), ECF Nos. 3326, 3327. Rather than apply OPLA's plain text, the federal district court misread OPLA's legislative history and held that the Act bars only those public-nuisance claims that seek compensatory damages. The Counties' public-nuisance claim proceeded to a jury, which ruled against the pharmacies. After a bench trial on remedies, the district court awarded the Counties $650 million styled as abatement relief.

The pharmacies appealed to the Sixth Circuit, and a panel of that court has now *sua sponte* certified the question of OPLA's meaning to this Court. As the pharmacies explained to the Sixth Circuit, certification is typically reserved for difficult questions of state law, and here OPLA's text is clear: the statute abrogates "*all*" common-law product-liability claims, including "*any* public nuisance claim" arising out of the "sale of a product"—with no exception for claims for "equitable abatement." R.C. 2307.71(A)(13), (B) (emphases added). Given OPLA's clarity, there is no need to delay resolution of this case. If this Court accepts the certification, however, the pharmacies respectfully request expedited briefing and oral argument in accordance with the schedule proposed below. The parties already briefed OPLA at length before the Sixth Circuit, and deciding this case expeditiously will avoid further harm to the parties and the broader multidistrict litigation.

BACKGROUND

A. Legal Background

The Ohio Product Liability Act is a comprehensive state statutory regime "intended to abrogate all common law product liability claims or causes of action." R.C. 2307.71(B). OPLA defines a "product liability claim" to include two types of actions. First, a product-liability claim "means a claim or cause of action that is asserted in a civil action . . . and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property." *Id.* 2307.71(A)(13). Second, a product-liability claim "*also* includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public." *Id*. (emphasis added). Taken together, those provisions abrogate product-based claims that *either*

seek a particular remedy (certain kinds of compensatory damages) *or* are based on a particular theory (that the product contributed to a public nuisance).

When OPLA was first enacted in 1988, the statute did not expressly abrogate all product-liability claims, nor did it specifically address public-nuisance claims. *See* R.C. 2307.71(M) (1988). In *City of Cincinnati* v. *Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶¶ 7-16, this Court allowed certain product-based public-nuisance claims to proceed, over a dissent's warning that the majority had taken "the ill-advised first step toward transforming nuisance into a monster that would devour in one gulp the entire law of tort," *id*. ¶ 82 (Cook, J., dissenting) (internal quotation marks omitted). After *Beretta*, the Ohio General Assembly in 2005 amended OPLA to clarify that the statute is "intended to abrogate *all* common law product liability claims or causes of action." R.C. 2307.71(B) (emphasis added); *see* 2004 Ohio Laws File 144 (Am. Sub. S.B. 80). Then in 2007, the General Assembly amended the statute again to eliminate any doubt that abrogated product-liability claims "also include[] any [product-based] public nuisance claim" brought under Ohio common law. 2006 Ohio Laws File 198 (Am. Sub. S.B. 117) (codified at R.C. 2307.71(A)(13)).

B. Factual Background

Across the country, States, counties, and municipalities struggling with the consequences of the abuse and diversion of opioids have turned to litigation to address those problems. Since the mid-2010s, the public-nuisance theory has become especially prominent, with state and local governments asserting common-law public-nuisance claims against companies that manufacture,

distribute, and dispense opioids. Many state courts have rejected such claims as an impermissible expansion of the tort of public nuisance.*

The present cases, however, along with thousands of other public-nuisance cases consolidated in a nationwide federal multidistrict litigation presided over by Judge Dan Aaron Polster in Cleveland, were allowed to proceed. In earlier public-nuisance cases brought by other Ohio plaintiffs in the MDL, a dispositive legal question quickly arose: whether OPLA abrogates common-law public-nuisance claims based on the manufacture, distribution, or sale of opioids. In particular, Summit County and the City of Akron brought a common-law public-nuisance claim and sought purported "abatement." The defendants in that case moved to dismiss the nuisance claim under OPLA, and then-Magistrate Judge David Ruiz agreed that "the plain language of the statute" abrogated the claims. *In re Nat'l Prescription Opiate Litig.*, 2018 WL 4895856, at *31 (N.D. Ohio Oct. 5, 2018) (Track One R. & R.).

The federal district court rejected the magistrate judge's recommendation. *In re Nat'l Prescription Opiate Litig.*, 2018 WL 6628898 (N.D. Ohio Dec. 19, 2018) (Track One MTD Op.). The court concluded without elaboration that the statutory text was ambiguous and instead focused on the "associated legislative history." *Id.* at *12-13. Relying on that legislative history, the court concluded that the 2005 amendment to the statute—which expressly abrogated "*all* common law product liability claims or causes of action"—did no more than overrule a decision of this Court concerning negligent design. The court also brushed aside the 2007 amendment—which

* *See, e.g.*, *State ex rel. Hunter* v. *Johnson & Johnson*, 499 P.3d 719 (Okla. 2021); *People* v. *Purdue Pharma L.P.*, 2021 WL 7186146 (Cal. Super. Ct. Dec. 14, 2021); *State ex rel. Ravnsborg* v. *Purdue Pharma, L.P.*, 2021 WL 6102727 (S.D. Cir. Ct. Mar. 29, 2021); *People* v. *Johnson & Johnson*, 2021 WL 7160515 (Ill. Cir. Ct. Jan. 8, 2021); *State ex rel. Stenehjem* v. *Purdue Pharma L.P.*, 2019 WL 2245743 (N.D. Dist. Ct. May 10, 2019); *State ex rel. Jennings* v. *Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Ct. Feb. 4, 2019); *City of New Haven* v. *Purdue Pharma, L.P.*, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019).

specifically forecloses *any* common-law public-nuisance suit—again based on the legislative history. In the court's view, although the statute purports to abrogate "any" product-based public-nuisance claims, it actually abrogates only claims seeking compensatory damages, not those seeking a monetary judgment in the form of "abatement." *See id*. at *12-15.

Here, the Counties alleged that the pharmacies caused a public nuisance under Ohio common law and sought billions of dollars in purported "abatement" relief for those past and present harms. The pharmacies moved to dismiss the Counties' claims on several grounds, including as relevant here that the claims are abrogated by OPLA. The federal district court denied the motion, relying on its prior ruling on OPLA. *In re Nat'l Prescription Opiate Litig.*, 477 F. Supp. 3d 613, 636 (N.D. Ohio 2020). After a trial on liability, the jury returned a verdict finding all three pharmacies liable for contributing to a public nuisance. In denying the pharmacies' motions for judgment as a matter of law, the district court elaborated on its prior OPLA analysis. As explained above, the court had previously held that OPLA abrogates only those common-law public-nuisance claims that seek certain compensatory damages. Track One MTD Op., 2018 WL 6628898, at *12-15. The court's JMOL opinion read OPLA even more narrowly, holding that it abrogates only statutory claims, and only those statutory claims alleging a defective design, warning, or warranty. *In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d 790, 811-814 (N.D. Ohio 2022) (JMOL Op.).

In May 2022, the federal district court conducted a bench trial to determine the scope of the remedies. The court adopted the Counties' proposed abatement plan in large part, and awarded a monetary judgment of $650.6 million to the two Counties, to be paid by the pharmacies over 15 years. *In re Nat'l Prescription Opiate Litig.*, 622 F. Supp. 3d 584, 592 (N.D. Ohio 2022). The court further entered an injunction that requires the pharmacies, among other things, to adopt

specific policies and procedures in filling prescriptions. The court entered final judgment in August 2022, and the pharmacies timely appealed.

In their briefing before the Sixth Circuit, the pharmacies explained that OPLA barred the Counties' claims. A number of supporting amici agreed, among them the Ohio Chamber of Commerce, U.S. Chamber of Commerce, American Tort Reform Association, and Product Liability Advisory Council. The pharmacies and their amici also challenged the verdict and remedy on several other grounds. On August 22, 2023, the panel requested supplemental briefing on whether to certify the OPLA issue to this Court. The pharmacies and the Counties both opposed certification on the grounds that it would delay the resolution of the appeal and that the panel could resolve the question without troubling this Court. The panel nevertheless certified to this Court the following question of Ohio law: "Whether the Ohio Product Liability Act, Ohio Revised Code § 2307.71 et seq., as amended in 2005 and 2007, abrogates a common law claim of absolute public nuisance resulting from the sale of a product in commerce in which the plaintiffs seek equitable abatement, including both monetary and injunctive remedies?" *In re Nat'l Prescription Opiate Litig.*, __ F.4th __, 2023 WL 5844325, at *6 (6th Cir. 2023).

ARGUMENT

Before the Sixth Circuit, the pharmacies opposed certification in order to avoid slowing down their appeal over a straightforward question of statutory interpretation. The same concerns remain just as pressing now. Accepting certification could further delay resolution of this case, which is not necessary in light of OPLA's clarity. If the Court accepts the certified question, however, the pharmacies respectfully request that the Court set an expedited briefing and argument schedule to allow the swift resolution of this issue and the entire federal appeal.

I. CERTIFICATION WOULD CAUSE PREJUDICIAL DELAY THAT IS UNNECESSARY GIVEN OPLA'S CLARITY.

Certification "entails more delay" than "an ordinary decision of the state question on the merits by the federal court." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 394 (1974) (Rehnquist, J., concurring). In this case, any delay would be prejudicial, as all parties agreed in their certification briefing to the Sixth Circuit. It is also unnecessary, because the certified question is sufficiently straightforward that the Sixth Circuit can resolve it without this Court's guidance.

A. Certification Could Cause Prejudicial Delay.

Before the Sixth Circuit, the parties agreed that delaying the resolution of this appeal would be harmful. Delay harms the pharmacies because they must pay for an appellate bond and face the uncertainty created by the erroneous $650 million verdict. Delay harms the Counties, they say, because it is an obstacle to obtaining the relief that the district court awarded. *See* Counties Supp. Br. 13-14, *Trumbull County* v. *Purdue Pharma L.P.*, No. 22-3750 (6th Cir. Sept. 5, 2023), ECF No. 88. Delay also harms the multidistrict litigation by leaving other pending cases without the valuable legal guidance that this bellwether case could provide. The district court began ruling on the issues raised in the pharmacies' appeal almost five years ago. MDL defendants have repeatedly—but unsuccessfully—attempted to obtain interlocutory review during the ensuing years. *See In re Nat'l Prescription Opiate Litig.*, No. 17-md-2804 (N.D. Ohio), ECF Nos. 1088, 1280, 3439, 4205. Plaintiffs opposed—and the district court denied—all prior efforts to obtain appellate review, including all prior efforts to certify the OPLA question to this Court. *See id.* ECF Nos. 1111, 1120, 1283, 3456, 3499, 4240, 4251. The pharmacies respectfully submit that the litigants and the multidistrict litigation itself would benefit from a speedy answer to the OPLA question.

B. Certification Is Unnecessary Given OPLA's Unambiguous Language.

The answer to the question certified by the Sixth Circuit is not a difficult one. Certification prevents federal courts from having to guess about "[p]oints of state law that seem unclear to federal courts" but "may be quite clear to informed local courts." *Scott* v. *Bank One Tr. Co., N.A.*, 62 Ohio St.3d 39, 43, 577 N.E.2d 1077 (1991) (internal quotation marks omitted). Certification is therefore particularly appropriate in circumstances where "a federal court applies different legal rules than the state court would have." *Id.* By contrast, certification is not necessary when well-established principles chart a clear course for the federal court to apply. *See Lutz* v. *Chesapeake Appalachia, LLC*, 148 Ohio St.3d 524, 2016-Ohio-7549, 71 N.E.3d 1010, ¶ 11 (declining to answer certified question "subject to the traditional rules of contract construction"). Here, all parties agree that Ohio statutes should be interpreted according to their "ordinary meaning." *State ex rel. More Bratenahl* v. *Village of Bratenahl*, 157 Ohio St.3d 309, 2019-Ohio-3233, 136 N.E.3d 447, ¶ 12. Interpreting OPLA thus turns entirely on the ordinary meaning of its statutory text.

1. Starting with that text, OPLA is "intended to abrogate *all* common law product liability claims or causes of action." R.C. 2307.71(B) (emphasis added). The Act spells out precisely what "product liability claims" it abrogates:

> "Product liability claim" means a claim or cause of action that is asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:
>
> > (a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
> >
> > (b) Any warning or instruction, or lack of warning or instruction, associated with that product;
> >
> > (c) Any failure of that product to conform to any relevant representation or warranty.

> "Product liability claim" also includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public.

Id. 2307.71(A)(13).

As that definition makes clear, OPLA covers two categories of abrogated "product liability claim[s]." First, "product liability claim" means a claim "that seeks to recover compensatory damages from a manufacturer or supplier" for certain harms resulting from a design defect, failure to warn, or failure to conform to any warranty. R.C. 2307.71(A)(13). Second, "product liability claim" "also includes *any* public nuisance claim or cause of action at common law" that is based on, among other things, the "marketing," "distribution," "or sale of a product." *Id.* (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). The second part of Section 2307.71(A)(13) thus means what it says: it abrogates all common-law public-nuisance claims involving the sale of products, regardless of the remedy sought.

On its face, OPLA's expansive language is not limited to public-nuisance claims seeking certain compensatory damages, as the Counties contend. To be sure, the *first* category of "product liability claim" is tied to whether a claim, of any kind, seeks compensatory damages from a manufacturer or supplier for the harm caused by a product. But the *second* category is additive and directly on point: the set of abrogated claims "*also includes* any public nuisance claim" based on the distribution or sale of a product. R.C. 2307.71(A)(13) (emphasis added); *see Mount Lemmon Fire Dist.* v. *Guido*, 139 S. Ct. 22, 25 (2018) ("'[A]lso' is a term of enhancement; it means 'in addition; besides' and 'likewise; too.'") (citation omitted). The second category thus

adds a set of abrogated claims based solely on the legal theory asserted rather than the relief requested: all public-nuisance claims based on the distribution or sale of a product. That should be the end of the analysis, because under Ohio law when the "meaning of a statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Prade* v. *Ninth Dist. Ct. of Appeals*, 151 Ohio St.3d 252, 2017-Ohio-7651, 87 N.E.3d 1239, ¶ 14 (citation omitted).

2. If there were any doubt, OPLA's history confirms its plain meaning. At first, this Court interpreted OPLA to abrogate only those product-liability claims that sought certain compensatory damages. *See LaPuma* v. *Collinwood Concrete*, 75 Ohio St.3d 64, 66-67, 661 N.E.2d 714 (1996). Then in *Beretta*, 95 Ohio St. 3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, at ¶¶ 7-16, the Court went further and permitted common-law public-nuisance claims based on the sale of handguns, over a dissent's warning against "transforming nuisance into a monster that would devour in one gulp the entire law of tort," *id*. ¶ 82 (Cook, J., dissenting) (internal quotation marks omitted).

The General Assembly took that warning to heart. First, it amended OPLA in 2005 to clarify that the statute is "intended to abrogate *all* common law product liability claims." R.C. 2307.71(B) (emphasis added). Despite that amendment, the City of Toledo brought a high-profile nuisance suit against lead-paint manufacturers. The legislature thus amended OPLA again in 2007 to make clear that its abrogation covers "any public nuisance claim or cause of action at common law" based on the "marketing," "distribution," or "sale of a product." R.C. 2307.71(A)(13). The trial court then dismissed Toledo's suit on that basis. *See City of Toledo* v. *Sherwin-Williams Co.*, Lucas C.P., No. CI200606040, 2007 WL 4965044 (Dec. 12, 2007).

The *Sherwin-Williams* court understood that OPLA had been amended specifically to expand the category of abrogated common-law suits.

3. The Counties advance a different reading of the statute, but that alone is not enough to warrant certification. After all, a "disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong." *Bank of Am. Nat'l Tr. & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 461 (1999) (Thomas, J., concurring in the judgment). Here, the interpretation the Counties have advanced is tortured and divorced from statutory context.

Starting with the text, the Counties have tried to avoid the statute's plain meaning by focusing on the word "includes." In their view, the word "includes" is illustrative and implies that what comes after that word is a subset of the initial category—certain claims for compensatory damages. Based on that strained interpretation, the Counties argue that only public-nuisance claims that seek compensatory damages qualify as "product liability claim[s]" abrogated by OPLA. The Counties are wrong; drafters sometimes use "includes" and "means" interchangeably. *See Dunlop* v. *Carriage Carpet Co.*, 548 F.2d 139, 142 (6th Cir. 1977) ("[W]e attach no particular significance to the substitution of 'means' for 'includes' in the [statutory] definition."). Regardless, the complete text says that the definition "*also* includes" public-nuisance claims based on products. R.C. 2307.71(A)(13) (emphasis added). The phrase "also includes" is plainly additive. *See Mount Lemmon Fire Dist.*, 139 S. Ct. at 25 (noting that "also" means " 'in addition; besides' and 'likewise; too' ") (citation omitted).

Moreover, the Counties' interpretation produces incoherent results. As a logical matter, OPLA's second category of product-liability claims cannot be a subset of the first category, because no common-law public-nuisance suit can ever fall within the first category. The first

category of product-liability claims contains three elements: (1) the claim is "asserted in a civil action pursuant to sections 2307.71 to 2307.80 of the Revised Code"; (2) it "seeks to recover compensatory damages from a manufacturer or supplier" for certain types of injuries; and (3) it "allegedly arose from . . . [t]he design . . . of that product; . . . [a]ny warning . . . associated with that product; [or] [a]ny failure of that product to conform to any relevant representation or warranty." R.C. 2307.71(A)(13) (brackets and numbering added).

The first and third of those elements can *never* be satisfied by a "public nuisance claim or cause of action at common law" based on the "marketing," "distribution," or "sale of a product." R.C. 2307.71(A)(13). No "public nuisance claim . . . *at common law*" will ever satisfy the first element, because by definition such a claim is not asserted pursuant to an Ohio statute. *Id*. (emphasis added). In addition, a public-nuisance claim based on the "distribution" or "sale of a product" is incompatible with the third element, which requires a claim for a defective design, warning, or warranty. Simply put, if OPLA's second category of abrogated product-liability claims were a subset of its first, it would be a null set. The incoherence of the Counties' reading underscores that OPLA's separate preemption of common-law nuisance claims must be additive and independent. It cannot be merely a subset of the first category.

Frustrated by the plain text of the Act, the Counties have primarily resorted to legislative history. They focus on snippets from statements of legislative intent accompanying the 2005 and 2007 amendments. They emphasize that in passing the 2005 amendment, the General Assembly expressed its intent "to supersede the holding" of this Court in *Carrel* v. *Allied Prods. Corp.*, 78 Ohio St.3d 284, 677 N.E.2d 795 (1997). 2004 Ohio Laws File 144 (Am. Sub. S.B. 80). From that, the Counties conclude that the legislature did *not* intend to supersede other cases like *LaPuma* and *Beretta*. But in the very next sentence, the Assembly identified the overarching

purpose of the 2005 amendment: "*to abrogate all common law product liability causes of action*." *Id*. (emphasis added). Even if the Assembly had one case in mind, it painted with a broad brush in the text it actually enacted. *See Stiner* v. *Amazon.com, Inc.*, 162 Ohio St. 3d 128, 2020-Ohio-4632, 164 N.E.3d 394, ¶ 27 (explaining that the legislature's "intent" in the 2005 OPLA amendments was "that the statutory text now controls Ohio's products-liability law").

The Counties have also focused on the General Assembly's statement that the 2007 amendment was "not intended to be substantive." But the rest of the sentence makes clear what the legislature meant: the amendment was "not intended to be substantive but [was] intended to clarify the General Assembly's original intent in enacting the Ohio Product Liability Act . . . , as initially expressed in [the 2005 amendment], *to abrogate all common law product liability causes of action including common law public nuisance causes of action*." 2006 Ohio Laws File 198 (Am. Sub. S.B. 117) (emphasis added). The Assembly plainly meant to change this Court's broad expansion of nuisance liability by confirming *its own original intent* in initially amending OPLA to foreclose common-law suits like the one here.

Finally, the Counties have pointed to *State ex rel. DeWine* v. *Purdue Pharma LP*, Ross C.P., No. 17 CI 261, 2018 WL 4080052 (Aug. 22, 2018), a case that allowed public-nuisance claims for abatement to proceed. The Sixth Circuit also noted *DeWine* in its certification order. But unlike *Sherwin-Williams Co.*, which recognized the import of the 2005 and 2007 amendments, *DeWine* does not even address OPLA's relevant language. A single, poorly reasoned trial-court decision does not justify certifying a straightforward issue of statutory interpretation.

II. IF THE COURT ACCEPTS CERTIFICATION, THE PHARMACIES RESPECTFULLY REQUEST AN EXPEDITED BRIEFING SCHEDULE.

If the Court concludes that certification is warranted, the pharmacies respectfully ask the Court to set an expedited briefing and argument schedule. For the reasons explained above, any

further delay in this case would impose significant harm on the parties, as both sides agreed in their Sixth Circuit briefs opposing certification. *See* pp. 7, *supra*. Expedited treatment should be feasible for all parties because the certified question presents a narrow and straightforward issue that both sides have already fully briefed before the Sixth Circuit and in the federal district court. The pharmacies thus respectfully request that if the Court accepts the certification, it set a briefing schedule under which the pharmacies' opening brief is due within 30 days of this Court's order accepting certification; the Counties' response brief is due 30 days after the opening brief is filed; the pharmacies' reply is due 21 days after the Counties' response brief is filed; and oral argument is scheduled at the earliest practicable date for the Court. That schedule would allow this Court to quickly resolve the OPLA issue and bring this litigation to a close.

CONCLUSION

For the foregoing reasons, the pharmacies respectfully submit that this Court should decline to delay resolution of the federal appeal by accepting certification. Alternatively, if the Court does accept the certification, the pharmacies respectfully request that the Court set an expedited schedule for briefing and argument.

Respectfully submitted,

/s/ Jeffrey B. Wall

Jeffrey B. Wall (*pro hac vice motion pending*)
Morgan L. Ratner*
Zoe A. Jacoby*
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Washington, DC 20006
(202) 956-7500

Counsel for Walgreens Petitioners

Donald B. Verrilli, Jr.*
Ginger D. Anders*
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Avenue NW
Washington, DC 20001
(202) 220-1100

Counsel for CVS Petitioners

Noel J. Francisco*
John M. Majoras*
Anthony J. Dick*
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939

James Saywell (#0092174)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-1190

Counsel for Walmart Inc. Petitioner

October 2, 2023

*****_Pro hac vice motion forthcoming_.

CERTIFICATE OF SERVICE

I certify that on this 2nd day of October, 2023, I electronically filed the foregoing with the Clerk of Court by using the Court's electronic filing system. I further certify that a copy of the foregoing was served by email upon the following counsel for respondents:

W. Mark Lanier
M. Michelle Carreras
LANIER LAW FIRM
10940 W. Sam Houston Pkwy. N.
Suite 100
Houston, TX 77064
(713) 659-5200
wml@lanierlawfirm.com
mca@lanierlawfirm.com

Peter H. Weinberger
SPANGENBERG SHIBLEY & LIBER
1001 Lakeside Avenue East
Suite 1700
Cleveland, OH 44114
(216) 696-3232
pweinberger@spanglaw.com

Hunter J. Shkolnik
Salvatore C. Badala
NAPOLI SHKOLNIK
270 Munoz Rivera Avenue, Suite 201
Hato Rey, Puerto Rico 00918
(787) 493-5088, Ext. 2007
hunter@napolilaw.com
sbadala@napolilaw.com

David C. Frederick
Minsuk Han
Ariela M. Migdal
Travis G. Edwards
Kathleen W. Hickey
Daren Zhang
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
dfrederick@kellogghansen.com
mhan@kellogghansen.com
amigdal@kellogghansen.com
tedwards@kellogghansen.com
khickey@kellogghansen.com
dzhang@kellogghansen.com

Frank L. Gallucci
PLEVIN & GALLUCCCI CO., L.P.A.
55 Public Square, Suite 222
Cleveland, OH 44113
(216) 861-0804
FGallucci@pglawyer.com

/s/ Jeffrey B. Wall
Jeffrey B. Wall

October 2, 2023